Supreme Court, U.S.
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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KCAL-TV CHANNEL 9,
Petitioner,
vs.
LOS ANGELES NEWS SERVICE
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Given the language in Section 107 of the Copyright Act of 1976 (17 U.S.C. §§ 101 *et seq.*) that news reporting is one of the core uses that are considered fair, and this Court's mandate that the necessarily commercial nature of beneficial uses of copyrighted material should not unduly militate against fair use, whether the Ninth Circuit erred in reversing summary judgment for defendant on a copyright infringement claim regarding the news broadcast of the videotaped beating of Reginald Denny during the 1992 Los Angeles Riots.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioner, who was the appellee in the Court of Appeals, is KHJ-TV, Inc., sued herein as KCAL-TV Channel 9 ("KCAL"). Respondent, who was the appellant in the Court of Appeals, is Los Angeles News Service.

The corporations related to KCAL at the present time, to be listed pursuant to Supreme Court Rule 29.1, are: Fidelity Television, Inc., Young Broadcasting of Los Angeles, Inc., and Young Broadcasting, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner KHJ-TV, Inc., sued herein as KCAL-TV Channel 9 ("KCAL"), respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the District Court granting summary judgment to KCAL is unreported, and is reprinted in the Appendix hereto. (Appendix at A-1 to A-8.)

The judgment entered in the District Court in favor of KCAL is unreported, and is reprinted in the Appendix hereto. (Appendix at A-9 to A-10.)

The opinion of the Court of Appeals reversing summary judgment is reported at 108 F.3d 1119 (9th Cir. 1997), and is reprinted in the Appendix hereto. (Appendix at A-11 to A-22.)

The order of the Court of Appeals requesting briefing as to whether the matter should be reheard en banc is unreported, and is reprinted in the Appendix hereto. (Appendix at A-23.)

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 11, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 107 of the Copyright Act of 1976 (17 U.S.C. §§ 101 *et seq.*) is reprinted in the Appendix hereto. (Appendix at A-24.)

STATEMENT OF THE CASE

A. Introduction

This case involves KCAL's use of a unique and important videotape — that of the beating of truck driver Reginald Denny during the 1992 Los Angeles Riots (the "Denny Videotape") — in connection with a small number of KCAL's news broadcasts. The issue presented is whether KCAL's news-reporting use of the Denny Videotape without express permission of its owner was protected by the copyright doctrine of fair use. As KCAL showed in the District Court, courts routinely hold that the use of copyrighted works for news-reporting purposes, especially factual and previously published works like the Denny Videotape, is

a protected fair use.[1] In contrast, respondent Los Angeles News Service ("LANS") has never cited any case or other authority — and KCAL is not aware of any — holding a news-reporting use of a previously published work, much less a previously published factual work, to be a copyright infringement. The liability LANS sought to impose was unprecedented, and the District Court granted summary judgment in favor of KCAL.

On March 11, 1997, the Ninth Circuit reversed the summary judgment ruling and held that, because some of the fair use factors favored LANS and some of the fair use factors favored KCAL, the issue of fair use could not be decided on summary judgment and must be sent to the jury. As demonstrated below, KCAL respectfully submits that this ruling was erroneous and should be reviewed by this Court.

The Ninth Circuit's ruling marked the first time that a news-reporting use of a previously published work was found to be beyond the fair use protections of the Copyright Act. The Ninth Circuit's holding conflicts with Supreme Court, other Ninth Circuit, and other Circuit Court authorities upholding summary judgment on fair use grounds despite the fact that some factors favored the plaintiff. If the Ninth Circuit were correct that any use that is commercial, unlicensed, and of an important part of the work effectively prevents summary judgment, then a plaintiff would virtually always be able to reach a jury when a news-reporting use is at issue, since those factors are present in virtually all news-reporting uses. That is inconsistent with the statutory provi-

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[1] *See, e.g., Mathieson v. Associated Press*, 23 U.S.P.Q.2d (BNA) 1685 (S.D.N.Y. 1992) (granting summary judgment to defendant on fair use grounds); *Holliday v. Cable News Network*, CV-92-3287-IH (C.D. Cal. June 11, 1993) (same); *Diamond v. Am-Law Pub. Corp.*, 745 F.2d 142 (2d Cir. 1984) (same); *Rotbart v. J.R. O'Dwyer Co.*, 34 U.S.P.Q.2d (BNA) 1085 (S.D.N.Y. 1995) (same).

sion that news-reporting is a favored use, and it would overturn decades of fair use law.

In addition, the Ninth Circuit's subsidiary ruling that the alleged commercial nature of the use "may give rise to a presumption or inference of harm" (Appendix at A-21) is contrary to this Court's ruling that no such presumption exists, and that "[i]f, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, * * * since these activities 'are generally conducted for profit in this country.' " *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 1174, 127 L. Ed. 2d 500 (1994) (citation omitted). Other courts have consistently ruled in accordance with *Campbell.*

The Ninth Circuit also incorrectly ruled that KCAL's attempt to get a license from LANS, which LANS refused to give to KCAL, was a factor that counted against fair use. There is Supreme Court and Circuit Court authority directly to the contrary. Indeed, it is difficult to see why a party that offers to pay for a license, out of an abundance of caution, should be in a *worse* position than a party that does not offer to pay at all.

Finally, the Ninth Circuit did not rule upon, or even address, KCAL's independent and fully briefed ground for summary judgment — namely, that its conduct was protected by the First Amendment. This defense has been acknowledged in the case law and other authorities, and is a ground for summary judgment here even if the fair use defense were to be rejected.

For the foregoing reasons, KCAL respectfully requests that the Court grant a writ of certiorari to review the Ninth Circuit's unprecedented ruling. This case goes to the very heart of the decision-making process of a broadcast news station during a breaking story of great importance. Here it

was the Los Angeles riots of five years ago, but the ruling in this case will affect all news coverage. Especially in the face of fast-breaking news of great public importance — such as the riots — a news station needs some degree of breathing room, and does not have time to conduct a detailed legal analysis regarding complex fair use and First Amendment questions. As in this case, the issue confronting the news station is generally "we received a tape, it is clearly newsworthy and important, can we show it without tracking down all potential copyright claimants or will we be sued?"

Lack of clarity as to what a news station may and may not do, which is created by the Ninth Circuit's ruling giving little guidance on the fair use issue (other than that it should go to a jury), will have a huge chilling effect on the stories that a news station decides it can broadcast. Accordingly, it is of great public importance for the Court to review the ruling to confirm to news disseminators, consistent with prior law, that news-reporting uses under the circumstances presented here are protected by the fair use doctrine.

B. Concise Statement Of Facts

On April 29, 1992, the four police officers accused of beating Rodney King were found by a Simi Valley jury to be not guilty. The verdict set off the worst rioting in recent memory. Reacting to provide the public with the fullest information possible, most local television stations, including KCAL, switched to near round-the-clock coverage of the riots.

During the evening of April 29, KCAL's Director of News, Bob Henry, was in KCAL's newsroom overseeing KCAL's news coverage of the riots. [ER 10 at 256][2] To bring to the public more complete coverage, Mr. Henry

[2]"ER" refers to the Excerpts of Record filed by respondent LANS in the Court of Appeals.

directed KCAL personnel to contact other television stations and sources to see if they might provide additional riot footage to KCAL. [ER 8 at ¶ 3] KCAL's News Manager, Beth Maharrey, contacted LANS and asked if KCAL could obtain a copy of the LANS videotape of a certain beating victim for broadcast on KCAL's news. LANS told Ms. Maharrey it would get back to her. Approximately one hour later, LANS called back and said it would not provide the Denny Videotape to KCAL. [ER 10 at 280-81]

One of the other sources from which KCAL attempted to obtain riot footage was KCBS. KCAL's Stephanie Medina called KCBS and asked if KCAL could use their riot footage. Because of the significance of the riots, this was a time of substantial cooperation among the various television stations, and KCBS provided a tape of riot footage to KCAL on April 30, with permission to use it in KCAL's news coverage. [ER 7 at ¶ 2] On a few occasions over the next few days, KCAL broadcast portions of the videotape it received from KCBS. [ER 8 at ¶ 5]

On May 3, KCAL received a letter from LANS' attorney, asking KCAL to stop showing certain footage, which turned out to be the Denny Videotape, because LANS owned the copyright. [ER 8 at ¶¶ 4-5] Although Mr. Henry believed the use of such footage in a news report would be a noninfringing fair use under the copyright laws, to avoid a potential legal battle he immediately directed that the Denny Videotape was no longer to be shown, and the footage was taken off the air so KCAL could investigate the status of the Denny Videotape. [ER 10 at 265; ER 8 at ¶¶ 4-5 and Exh. B]

KCAL's investigation revealed the footage had been included on the tape from KCBS, which KCBS told KCAL it could use. KCAL checked with KCBS to inquire as to the status of the footage. KCBS apologized to KCAL and said the footage should not have been included on the tape given

to KCAL. [ER 8 at ¶ 5; ER 7 at ¶¶ 3-4] In a letter dated May 11, 1992, KCAL informed LANS of the investigation and that the footage was no longer being shown by KCAL. [ER 8 Exh. B]

C. Procedural History

On May 10, 1994, KCAL filed a motion for summary judgment on the grounds that (1) KCAL's use of the Denny Videotape for news reporting purposes was a fair use under Section 107 of the Copyright Act, and (2) KCAL's use of the Denny Videotape for news reporting purposes was protected by the First Amendment. On June 9, 1994, the District Court issued a written order granting summary judgment to KCAL on the issue of fair use, without reaching the alternative First Amendment issue. (Appendix at A-1 to A-8.)

On March 11, 1997, a panel of the Ninth Circuit reversed the District Court's ruling and remanded the case for further proceedings consistent with its decision (the "Opinion"). (Appendix at A-11 to A-22.)

On April 17, 1997, before the matter was returned to the District Court, the Ninth Circuit *sua sponte* ordered that the parties file simultaneous briefs on the issue of whether the Panel's Opinion should be reheard by the Ninth Circuit en banc. The parties filed simultaneous briefs in response to that request, and the Ninth Circuit is presently considering whether to rehear the matter en banc. (Appendix at A-23.)

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S OPINION CONTRADICTS A RECENT DECISION OF THIS COURT AND CREATES A DIRECT CONFLICT WITH OTHER CIRCUIT COURT DECISIONS

A. The Ninth Circuit's Opinion Contradicts This Court's Ruling In *Campbell v. Acuff-Rose* That Commerciality Does Not Give Rise To A Presumption Against Fair Use, And Also Creates A Conflict On This Issue With Other Circuit Court Decisions.

The Ninth Circuit's ruling that the alleged commercial nature of the use "may give rise to a presumption or inference of harm" (Appendix at A-21) is contrary to this Court's recent ruling that no such presumption exists. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 1174, 127 L. Ed. 2d 500 (1994). Because virtually all news reporting is done by for-profit media outlets, denying the fair use defense to a for-profit user would eviscerate the statutory recognition of news reporting as a fair use. *Campbell*, 114 S. Ct. at 1174 ("If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, * * * since these activities 'are generally conducted for profit in this country'") (citation omitted). Thus, news-reporting and other uses listed in the preamble to Section 107 of the Copyright Act of 1976 (Appendix at A-24) have routinely been accepted as noninfringing fair uses, even where the defendant was a profit-making entity and the use was for "commercial" purposes.[3]

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[3] *See, e.g., Consumers Union of U.S., Inc. v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980); *New Era Publications Int'l, ApS v. Carol Pub.*

In this regard, courts have specifically recognized that, regardless of profit concerns, when a use is for one of the categories listed in the preamble to Section 107, that settles the "purpose and character" issue in favor of the defendant. *Mathieson v. Associated Press*, 23 U.S.P.Q.2d (BNA) 1685, 1689 (S.D.N.Y. 1992) ("[T]here is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in section 107. If a [work] falls into one of these categories * * *, assessment of the first fair use factor should be at an end, even though, as will often be the case, the [defendant] anticipates profits") (internal quotation marks omitted; brackets in original). Accordingly, since KCAL's broadcasts were for purposes of news reporting, the District Court properly held that the first factor "points strongly in favor of KCAL's use being a fair use" (Appendix at A-3), and the Ninth Circuit's allowance of "commerciality" to undermine the favored status of news-reporting was erroneous.[4]

The Ninth Circuit's Opinion is unprecedented in allowing a news-reporting use of a previously published work to go to a jury on the issue of fair use. As KCAL showed in the District Court, courts routinely hold that the use of copy-

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Group, 904 F.2d 152 (2d Cir.), *cert. denied*, 498 U.S. 921 (1990); *Haberman v. Hustler Mag., Inc.*, 626 F. Supp. 201 (D. Mass. 1986).

[4]KCAL's fair use defense is not weakened by suggesting that KCAL's use had a negative impact on LANS' market for the Denny Videotape. There is no evidence at all that KCAL's use led to any lost sales. Indeed, LANS' owner could not identify any such lost sales or potential sales at his deposition. [ER 10 at 219-20] LANS' speculative — and unsupported — suggestion that there might have been some hypothetical lost sales is easily seen to be wrong. Since LANS *rejected* KCAL's offer to pay for the tape, LANS did not lose any sale to KCAL. And since the Denny Videotape was widely broadcast both before and after KCAL showed it [ER 10 at 202-16, 223-24, 248, 256-57], KCAL's few broadcasts among an ocean of other broadcasts cannot logically have led to any lost sales to third parties.

righted works for news-reporting purposes — especially factual and previously published works like the Denny Videotape — is clearly a protected fair use. (*See* footnote 1, above.) Although this news-reporting use does not end the inquiry, it weighs very heavily in favor of a finding of fair use. *Mathieson*, 23 U.S.P.Q.2d at 1689 ("Because defendant's use of plaintiff's photos clearly falls within the permissible use category of 'news reporting,' the Court must lean decidedly in the direction of finding fair use even as it looks at the other three factors").

The Ninth Circuit erred by identifying three circumstances present in virtually all news reporting fair use cases — commercial use, unlicensed use, and use of the "heart" of the work — and using these three circumstances to swallow the rule that news-reporting is a favored fair use. If the Ninth Circuit were correct, a news station could virtually never obtain summary judgment based on a fair use defense.

As discussed above, the Ninth Circuit erred in finding that the "commercial nature" of the use was a factor substantially, and indeed presumptively, tending to negate fair use in a news-reporting context.

The Ninth Circuit also erred by ruling that the fact that KCAL's use was unlicensed was a factor tending to negate fair use. *See, e.g.*, Appendix at A-18 (Ninth Circuit's statement that "[t]he fact that KCAL used LANS's copyrighted footage free of charge, rather than paying LANS or someone else for the footage," is a factor against fair use). By definition, *all* cases in which a fair use defense is raised involve unlicensed use. If the use were licensed, there would be no need to raise the defense. The question, therefore, is whether a particular unlicensed use is the type of use the Copyright Act approves of as a protected fair use. Under the Ninth Circuit's analysis, all fair use defendants would start out with a strike against them because they engaged in an

unlicensed use. There is no support in the law for such a proposition.

Finally, the Ninth Circuit also erred in giving undue weight to its conclusion that the small amount of footage that KCAL used constituted the "heart" of the Denny Videotape. That factor has only a minimal relationship to fair use when one of the enumerated favored uses (such as news-reporting) is at issue. Courts, including the Ninth Circuit itself, have upheld a defendant's fair use defense even in a case in which the defendant copied plaintiff's entire work for commercial purposes. *See, e.g., Hustler Mag., Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1156 (9th Cir. 1986). Indeed, this Court has twice recognized that even the use of a substantial portion of a prior work will be protected by the doctrine of fair use in appropriate circumstances.[5] Since news reporting requires the important portions to be shown, the use of important portions cannot weigh significantly against fair use. Otherwise, the fair use privilege for news reporting would be rendered almost meaningless.[6]

The foregoing errors by the Ninth Circuit combined to blot out the unassailable rule that news-reporting is a favored use. Once that policy decision was made by Con-

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[5] *See, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564, 105 S. Ct. 2218, 2232, 85 L. Ed. 2d 588 (1985) ("even substantial quotations might qualify as fair use in a review of a published work"); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50, 104 S. Ct. 774, 792, 78 L. Ed. 2d 574 (1984) (holding that the copying of entire televised works for later viewing was a noninfringing fair use).

[6] *See, e.g., Mathieson*, 23 U.S.P.Q.2d (BNA) at 1691 ("the significance of the second (and, for that matter, third) factor is diminished by the 'strong presumption' favoring a finding of fair use where * * * the allegedly infringing use 'fits the description' of a permissible use, such as news reporting as described in § 107") (citation omitted).

gress, and upheld through decades of case law, there was no reason to look at individual characteristics of news-reporting (commerciality, unlicensed use, "heart" of the work) and reweigh these factors to strip news-reporting of its favored status. The fact that some factors favored KCAL and some favored LANS did not render summary judgment inappropriate.[7] The appropriate question was, resolving all factual conflicts in favor of LANS, was KCAL entitled to summary judgment. Since the cases have *uniformly* held a news-reporting use of a previously published work to be a fair use, the correct conclusion was that summary judgment was properly granted.[8]

Accordingly, the Ninth Circuit's Opinion reflects a marked departure from settled law, including decisions by

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[7]Numerous other cases have similarly upheld summary judgments on fair use grounds, despite the fact that some of the fair use factors favored the plaintiff. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984); *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986); *Hustler Mag., Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986); *Consumers Union of U.S. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984).

[8]The Ninth Circuit made another subtle, but important, error by reasoning as though the copyright laws protect all facets of the Denny Videotape. They do not. Rather, the copyright laws protect *only* the creative material on the Denny Videotape, such as camera angles, choice of lenses, and the like. The factual images of the beating itself are not copyrightable and thus are freely usable by anyone. *See, e.g., Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359, 363, 111 S. Ct. 1282, 1295, 1297, 113 L. Ed. 2d 358 (1991) (holding that "[F]acts contained in existing works may be freely copied" and "As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimus* quantum of creativity"). Thus, in considering the nature and amount of material taken, the only elements that should factor into the fair use analysis are any copyrightable elements such as camera angles, choice of lenses, and the like, not the uncopyrightable factual images.

this Court, the Ninth Circuit itself, and other Circuit Courts. KCAL respectfully submits that, therefore, its petition for certiorari should be granted.

B. The Ninth Circuit's Opinion Contradicts This Court's Ruling In *Campbell v. Acuff-Rose* That A Defendant's Seeking Of A License Does Not Militate Against Fair Use, And Also Creates A Conflict On This Issue With Other Circuit Court Decisions.

The Ninth Circuit also identified the fact that KCAL asked for a license from LANS as a factor militating against fair use. (Appendix at A-19, A-21.) That is an error as well, for at least two reasons.

The Ninth Circuit's statement that KCAL's request for a license somehow tends to negate fair use is flatly inconsistent with this Court's recent ruling that requests for a license do not militate against fair use:

> "If the use is otherwise fair, then no permission need be sought or granted. *Thus, being denied permission to use a work does not weigh against a finding of fair use.*"

Campbell, 114 S. Ct. at 1174-75 n.18 (emphasis added).

If anything, the fact that KCAL sought a license from LANS — which LANS refused — should militate in favor of fair use. The fact that KCAL sought a license shows that KCAL was not trying to "use[ ] LANS's copyrighted footage free of charge, rather than paying LANS or someone else for the footage," as the Ninth Circuit incorrectly ruled. (Appendix at A-18.) Rather, KCAL tried to license the tape to avoid a potential dispute if KCAL relied solely on its fair use rights. LANS, however, refused to license the tape to KCAL, even though the Denny Videotape itself was a huge news story. If not for fair use, LANS would have been able to decide who was able to report the news and who was not.

It would be ironic for a news station that offered to pay to license a videotape to be in a worse position than a station that used the tape without even trying to compensate the owner. KCAL's attempt to license the tape from LANS, resorting to its fair use rights only after LANS refused to grant a license, shows KCAL's *good faith* throughout the process. Indeed, LANS did not even lose a single sale by virtue of KCAL's fair use, since LANS had already rejected any payment from KCAL. It is difficult to see any legally cognizable injury suffered by a company that refuses to license a videotape to one particular news station.

The Opinion is also inconsistent with other Circuit Court opinions holding that the seeking of a license is not a factor that militates against fair use. Most notably, the Ninth Circuit itself held exactly that in *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986). In *Fisher*, the Ninth Circuit expressly considered the issue and ruled that a defendant's seeking of a license from the plaintiff does not militate against a fair use defense, and that such conduct should not be deterred:

> "[T]o consider Dees blameworthy because he asked permission [to use plaintiff's work] would penalize him for this modest show of consideration. Even though such gestures are predictably futile, we refuse to discourage them."

Fisher, 794 F.2d at 437.

The Second Circuit has similarly considered the issue and ruled that the seeking of a license is not a factor that militates against fair use. *See Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1264 (2d Cir. 1986), *cert denied*, 481 U.S. 1059 (1987) (defendant's decision to publish despite plaintiff's denial of permission does not suggest bad faith in a fair use case, since defendant "was willing to pay the customary price" and "should not be penalized for erring on the side of safety").

Accordingly, the Ninth Circuit's Opinion reflects a marked departure from settled law, including decisions by this Court, the Ninth Circuit itself, and the Second Circuit. KCAL respectfully submits that, therefore, its petition for certiorari should be granted.

C. The Ninth Circuit Failed To Address Whether KCAL's Use Of The Denny Videotape Was Protected By The First Amendment, A Dispositive Issue That Was Fully Briefed And Before The Court.

It is well settled that a ruling can be upheld on appeal upon any ground submitted to the District Court — even upon a ground that the District Court did not reach. *See, e.g., Partington v. Gedan*, 961 F.2d 852, 860 (9th Cir.), *cert. denied*, 506 U.S. 999 (1992). Although the District Court did not reach the First Amendment issue (because the issue of fair use was fully dispositive), the First Amendment provides an independent basis upon which to affirm summary judgment.

Despite the fact that the First Amendment defense was fully briefed to the Ninth Circuit, and provided a wholly independent ground for upholding summary judgment, that court did not address the issue. KCAL respectfully submits this was an error because, even if KCAL's use of the Denny Videotape for some reason does not qualify as fair use, the First Amendment independently protects KCAL from liability for infringement.

As the Ninth Circuit itself has recognized, copyright law must accommodate First Amendment concerns. *See, e.g., Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1171 (9th Cir. 1977) ("There may be certain rare instances when first amendment considerations will operate to limit copyright protection for graphic expressions of newsworthy events"). This is accomplished in most cases in two ways: first, by "ensuring that copyright protec-

tion extends only to the forms in which ideas and information are expressed and not to the ideas and information themselves," and second, through the fair use doctrine. *Los Angeles News Service v. Tullo*, 973 F.2d 791, 795 (9th Cir. 1992).

However, in some circumstances, the idea-expression dichotomy and the fair use doctrine may not adequately protect the First Amendment interests. Borrowing from Professor Nimmer's treatise on copyright law, the Ninth Circuit has discussed the issue as follows:

> "Citing the exclusive photographs of the My Lai massacre during the Viet Nam war and the Zapruder home movie of the assassination of President John Kennedy as examples, *Nimmer* proposes that "where the 'idea' of a work contributes almost nothing to the democratic dialogue, and it is only its expression which is meaningful," copyright protection of the expression should be limited in the interest of public access to information necessary to effective public dialogue. [1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.10[C] [2] at 1-82—1-84]. *Nimmer* explains:
>
> > No amount of words describing the "idea" of the massacre could substitute for the public insight gained through the photographs. *The photographic expression, not merely the idea, became essential if the public was to fully understand what occurred in that tragic episode. It would be intolerable if the public's comprehension of the full meaning of My Lai could be censored by the copyright owner of the photographs . . .*
> >
> > Similarly, in the welter of conflicting versions of what happened that tragic day in Dallas, the Zapruder film gave the public authoritative answers that it desperately sought; answers that no

> other source could supply with equal credibility. *Again, it was only the expression, not the idea alone, that could adequately serve the needs of an enlightened democratic dialogue.*
>
> *Id.* at 1-83—1-84."

Los Angeles News Service, 973 F.2d at 795-97 (emphasis added).

Acknowledging the existence of First Amendment concerns, the *Los Angeles News Service* court found copyright infringement in that case because, among other things, and in light of the particular facts of that case: (1) the defendant was in the business of selling videotaped news clips for profit, *not* in the business of news reporting, (2) the recorded events were not of vital concern to any public controversy or debate, and (3) there was no showing that other depictions and reports of the events recorded in the works at issue in that case were "unavailable or omitted information vital to the public understanding of the events." *Id.* at 795-97.

The present case, by contrast, presents precisely the situation in which the First Amendment precludes copyright liability even if fair use were for some reason not a defense. As Nimmer observed with respect to the My Lai photographs, telecast of the Denny Videotape is "essential if the public [is] to fully understand what occurred in that tragic episode." *Id.* at 795. Again, it is not merely the occurrence of a beating that is unusual and newsworthy here, but rather (1) the fact that the beating was the aftermath of the verdicts in the Rodney King case, (2) the fact that the Denny Videotape could be visually compared and contrasted with the videotape of the Rodney King beating so as to allow the public to draw conclusions about potential bias in the jury system, and (3) the fact that the Denny Videotape was singularly important evidence relating to the hotly debated

issue of the attacker's identity. To paraphrase *Nimmer*, "no amount of words describing the 'idea' of the [Reginald Denny beating and its visual comparison to the Rodney King beating] could substitute for the public insight gained through the [Denny Videotape]." *See also Triangle Publications Inc. v. Knight-Ridder Newspapers Inc.*, 626 F.2d 1171, 1184 (5th Cir. 1980) ("a First Amendment privilege may, and *should* exist where utilization of the copyrighted expression is necessary for the purpose of conveying thoughts") (emphasis in original).

Moreover, in the present case, unlike in *Los Angeles News Service*, (1) KCAL legitimately used the Denny Videotape for news reporting purposes, (2) there is no other footage of the actual beating available (especially footage of Mr. Denny being hit in the head with a brick),[9] and (3) mere verbal reports of the events will "omit[ ] information vital to the public's understanding of the events" (*Los Angeles News Service*, 973 F.2d at 796), because they would not give the public the eyewitness view of the beating necessary for the public to make its own conclusion concerning the beating. If use of the Denny Videotape for news reporting purposes were not protected by fair use or the First Amendment, LANS would be able to hold hostage the only available videotaped images of the Denny beating, parcelling them out only if, and to whom, LANS so chooses.

Finally, given that the Ninth Circuit recognized the possibility of a First Amendment privilege in both *Sid & Marty Krofft* and *Los Angeles News Service*, it is difficult to imagine a more appropriate case than the present one, which involves (1) a one-of-a-kind videotape, (2) that was used for legitimate news-reporting purposes, (3) that LANS and its expert expressly recognized to be of utmost public

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[9] *See, e.g.*, ER 8 ¶ 8; ER 10 at 198-99; ER 1 ¶ 11.

importance, and (4) that LANS refused to license to KCAL at any price.

Accordingly, the First Amendment provides a separate defense — independent from fair use — to copyright liability even if KCAL's use is held not to qualify as a fair use. The Ninth Circuit erred by failing to rule on this alternative ground for upholding the District Court's ruling, which was fully briefed and properly at issue.

CONCLUSION

For the foregoing reasons, KCAL respectfully requests that the Court issue a writ of certiorari to review the Ninth Circuit's reversal of the District Court's grant of summary judgment in favor of KCAL.

DATED: June 9, 1997.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES NEWS SERVICE,
Plaintiff,

vs.

KCAL-TV CHANNEL 9, FILM BANK,
a California corporation,
PAULA LOMBARD,
Defendants.

Case No. 92-4247 RG (CTx)

ORDER GRANTING SUMMARY JUDGMENT

DATE: May 31, 1994
TIME: 10:00 a.m.
CTRM: Honorable Richard A. Gadbois, Jr.

The motion of defendant KHJ-TV, Inc., sued herein as KCAL-TV Channel 9 ("KCAL"), for summary judgment came on regularly for hearing before this Court on May 31, 1994 in the Courtroom of the Honorable Richard A. Gadbois, Jr. Jeffrey B. Valle and David S. Shukan of Skadden, Arps, Slate, Meagher & Flom appeared on behalf of KCAL and William A. Bergen appeared on behalf of plaintiff Los Angeles News Service ("LANS").

After considering the moving and opposing papers, arguments of counsel and all other matters presented to the Court, and good cause appearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The relevant facts are uncontroverted, including the following:

(a) The videotape at issue, depicting the beating of Reginald Denny during the Los Angeles Riots of 1992

(the "Denny Videotape"), is a unique and newsworthy video- tape of significant public interest and concern;

(b) KCAL used portions of the Denny Videotape in its newscasts for purposes of news reporting; and

(c) LANS cannot identify any sale or license, or potential sale or license, that was lost due to any act by KCAL.

2. Based upon the uncontroverted material facts, KCAL is entitled to summary judgment for the following reasons:

A. *Fair Use*

The doctrine of fair use exempts KCAL from liability in this case. Fair use is an "equitable rule of reason," that requires a "sensitive balancing of interests." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448. 455 n.40, 104 S. Ct. 774, 792, 795 n.40, 78 L. Ed. 2d 574 (1984). Section 107 expressly enumerates several uses, including news reporting, that exemplify fair uses, and then lists four nonexclusive factors to be considered in determining whether a particular use is a fair use:

1. The purpose and character of the use, whether such use is of a commercial nature or is for non-profit educational purposes;

2. The nature of the copyrighted work;

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4. The effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. These factors, show that KCAL's use of the Denny Videotape in this case was a fair use.

(1) *The Purpose and Character of the Use*

It is undisputed that KCAL used the Denny Videotape for news reporting purposes, one of the uses specifically enumerated by Congress in Section 107 to "give some idea of the sort of activities the courts might regard as fair use under the circumstances." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561, 105 S. Ct. 2218, 2231, 85 L. Ed. 2d 588 (1985) (quoting S. Rep. No. 94-473, 94th Cong., 1st Sess. 61 (1975)). Although this news-reporting use does not end the inquiry, it weighs heavily in favor of fair use. *Mathieson v. Associated Press*, 23 U.S.P.Q.2d 1685, 1689 (S.D.N.Y. 1992). ("Because defendant's use of plaintiffs photos clearly falls within the permissible use category of 'news reporting,' the Court must lean decidedly in the direction of finding fair use even as it looks at the other three factors").

The fact that KCAL is a profit-making entity does not in any way diminish the fair use defense. *See, e.g., Consumers Union of U.S., Inc. v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984). Courts routinely recognize that, regardless of for-profit or not-for-profit concerns, when a use is for one of the categories listed in the preamble to Section 107. that settles the "purpose and character" issue in favor of the defendant. *See, e.g., Mathieson*, 23 U.S.P.Q.2d at 1689 ("[T]here is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in section 107. If a [work] falls into one of these categories * * *, assessment of the first fair use factor should be at an end, even though, as will often be the case, the [defendant] anticipates profits") (internal quotation marks omitted; brackets in original). Because KCAL's broadcasts were for purposes of news reporting, the first factor points strongly in favor of KCAL's use being a fair use.

(2) *The Nature of the Copyrighted Work*

The second factor of Section 107 — the nature of the copyrighted work — also points toward fair use. "The scope of fair use is greater when 'informational' as opposed to more 'creative' works are involved." *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153-54 (9th Cir. 1986). As the Supreme Court has held, "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy." *Harper & Row*, 471 U.S. at 563, 105 S. Ct. at 2232.

In addition, it is undisputed that the Denny Videotape was published before KCAL ever used it. The law is clear that the fact that a work has been previously published is a substantial factor in favor of a finding of fair use. *See, e.g., New Era Publications Int'l APS v. Carol Pub. Group*, 904 F.2d 152, 157 (2d Cir.), *cert. denied*, 498 U.S. 921 (1990) ("Whether or not a work is published is critical to its nature under factor two, because 'the scope of fair use is narrower with respect to unpublished works' "), *quoting Harper & Row*, 471 U.S. at 564, 105 S. Ct. at 2232.

Here, the Denny Videotape is a factual rather than fictional work, and a published rather than unpublished work. Accordingly, the second fair use factor points strongly toward fair use as well.

(3) *The Amount of the Use*

The third fair use factor directs the Court to consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." This factor, as well, points toward fair use because only a small portion of the total amount of the Denny Videotape was used by KCAL and, even then, only enough for KCAL to carry out its appropriate news-reporting function.

Even accepting LANS' argument that KCAL used the "heart" of the Denny Videotape, that does not in any way

preclude fair use. For example, even though the defendants in *Hustler* had copied plaintiff's entire work, the Ninth Circuit nonetheless upheld the defendant's fair use defense. *Hustler*, 796 F.2d at 1156. *See also Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 212 (D. Mass. 1986) (finding fair use although entire photograph copied); *Guccione v. Flynt*, 1984 WL 18, *4 (S.D.N.Y. 1984) (same). The United States Supreme Court has twice recognized that even the use of a substantial portion of a prior work will be protected by the doctrine of fair use in appropriate circumstances. *See, e.g., Harper & Row*, 471 U.S. at 564, 105 S. Ct. at 2234 ("even substantial quotations might qualify as fair use in a review of a published work"); *Sony*, 464 U.S. at 449-50, 104 S. Ct. at 792 (holding that the copying of entire televised works for later viewing was a noninfringing fair use).

The amount of the Denny Videotape used by KCAL, even if it were considered to be the "heart," does not militate against fair use. Indeed, since news-reporting requires that the most important images of important news events be shown, the use of important portions cannot weigh significantly against fair use in such situations. Otherwise, the fair use privilege for news reporting would be rendered almost meaningless. *See, e.g., Mathieson*, 23 U.S.P.Q.2d at 1691 ("the significance of the second (and, for that matter, third) factor is diminished by the 'strong presumption' favoring a finding of fair use where * * * the allegedly infringing use 'fits the description' of a permissible use, such as news reporting as described in § 107") (citation omitted).

(4) *The Effect of the Use on the Value of the Copyrighted Work*

"In determining whether the [allegedly infringing] use has harmed the [copied] work's value or market, courts have focused on whether the infringing use: (1) tends to

diminish or prejudice the potential sale of the work, or (2) tends to interfere with the marketability of the work, or (3) fulfills the demand for the original work." *Hustler*, 796 F.2d at 1155-56 (citations and interior quotations omitted). None of these elements is present here.

KCAL's use of the Denny Videotape did not diminish the potential sale of the work (first element) or interfere with its marketability (second element). Because the Denny Videotape is primarily a factual or informational work, as opposed to a fictional work, it does not have the "broad potential secondary markets" that create a "greater potential for commercial harm." *Sony*, 464 U.S. at 455 n.40, 104 S. Ct. at 795 n.40. Furthermore, the uncontroverted evidence shows that LANS entered into more than a dozen licenses for the Denny Videotape — worth many tens of thousands of dollars — well after KCAL used the Denny Videotape in its news reporting, and Tur, at his deposition, could not identify any specific lost sale or lost potential sale of the Denny Videotape. *See, e.g., Mathieson*, 23 U.S.P.Q.2d at 1690 (ruling that defendant's news-reporting use of plaintiff's photographs did not adversely affect the market for the photographs where, among other things, "plaintiff could not specifically identify a single situation in which he lost a pending sale or license agreement, or the specific opportunity for such a sale or license, as a result of AP's dissemination of the cover photo").

Similarly, KCAL's use of a portion of the Denny Videotape for news reporting purposes did not fulfill the demand for the original work (third element). An analogous issue was presented in the famous fair use case involving Abraham Zapruder's film of the Kennedy assassination. *See Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968). There, the court ruled that the use of images from the copyrighted film in a book about the assassination was a fair use, not an infringement. In ruling

that the use was a fair use, the court recognized, among other things, that the book was not likely to replace any demand for the original work:

> "There are projects for use by plaintiff of the film in the future as a motion picture or in books, but the effect of the use of certain frames in [defendant's] Book on such projects is speculative. It seems more reasonable to speculate that the Book would, if anything, enhance the value of the copyrighted work; it is difficult to see any decrease in its value."

Time, 293 F. Supp. at 146. Just as the use of newsworthy copyrighted images in a book about the Kennedy assassination was held not to adversely affect any market in *Time*, KCAL's use of newsworthy copyrighted images in a news story about the Los Angeles Riots and their aftermath did not adversely affect any market here. Again, the fourth fair use factor weighs in favor of fair use.

In sum, a balancing of the statutory fair use factors shows that KCAL's use of the important and newsworthy Denny Videotape for news reporting purposes was a noninfringing fair use.

B. *Film Bank*

KCAL's use of Film Bank as a library for KCAL's noninfringing news coverage was not an infringement. *See, e.g., Mathieson v. Associated Press*, 23 U.S.P.Q.2d 1685, 1687 (S.D.N.Y. 1992).

C. *First Amendment*

Because the Court rules that, as a matter of law, there was no infringement, the Court does not reach the issue as to whether the First Amendment of the United States Constitution provides a separate ground for granting KCAL's motion for summary judgment.

D. *Willfulness*

Because the Court rules that, as a matter of law, there was no infringement, LANS' cause of action for willful copyright infringement fails as a matter of law.

3. Accordingly, KCAL's motion for summary judgment is GRANTED; and

4. KCAL is awarded its costs of suit from LANS.

DATED: June 9, 1994

RICHARD A. GADBOIS, JR.
Honorable Richard A. Gadbois, Jr.
United States District Judge

Submitted by:

JOHN A. DONOVAN
JEFFREY B. VALLE
DAVID S. SHUKAN
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM

By: /s/ DAVID S. SHUKAN
David S. Shukan
Attorneys for Defendant
KHJ-TV, INC.
(sued herein as KCAL-TV
Channel 9)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES NEWS SERVICE,
Plaintiff,

vs.

KCAL-TV CHANNEL 9, FILM BANK,
a California corporation,
PAULA LOMBARD,
Defendants.

Case No. 92-4247 RG (CTx)

FINAL JUDGMENT

This action came on regularly for hearing before this Court in the courtroom of the Honorable Richard A. Gadbois, Jr. and the issues having been duly heard and an order granting summary judgment on all claims in favor of defendant KHJ-TV, Inc. (sued herein as KCAL-TV Channel 9 ("KCAL")) having been issued on June 9, 1994, and a motion for reconsideration of plaintiff Los Angeles News Service ("LANS") having been heard and denied by this Court on January 9, 1995, and there being no claims for relief remaining in this lawsuit by any party against any party (given that the claims against the non-KCAL defendants have been dismissed or about to be dismissed imminently by stipulation pursuant to settlement),

IT IS HEREBY ORDERED AND ADJUDGED that (1) plaintiff LANS take nothing on the claims asserted herein and that judgment thereon shall be entered in favor of KCAL, and (2) that KCAL shall be entitled to its costs of suit as awarded herein.

DATED: 2-10, 1995

RICHARD A. GADBOIS, JR.

Richard A. Gadbois, Jr., Judge
United States District Court

SUBMITTED BY:

LAW OFFICES OF WILLIAM A. BERGEN
William A. Bergen

OBERSTEIN, DONIGER, FETTER, KIBRE & HORWITZ
Thomas Doniger
Henry D. Fetter

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOS ANGELES NEWS SERVICE,
Plaintiff-Appellant,

v.

KCAL-TV CHANNEL 9,
Defendant-Appellee.

No. 95-55261

D.C. No.
CV-92-04247-RG

OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
June 6, 1996-Pasadena, California

Filed March 11, 1997

Before: Melvin Brunetti and Pamela Ann Rymer,
Circuit Judges, and Jack E. Tanner,* District Judge.

Opinion by Judge Rymer

SUMMARY

Intellectual Property/Copyrights

The court of appeals reversed a judgment of the district court. The court held that telecasts of a news service's copyrighted videotape of the Reginald Denny beating in the

*Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

aftermath of the Rodney King verdict are not exempted from liability under the fair use doctrine. —

Appellant Los Angeles News Service (LANS) was an independent news organization that provided news stories to the news media. From its helicopter, LANS shot a four-minute videotape of the beating of Reginald Denny in the aftermath of the Rodney King verdict. The videotape was copyrighted and licensed to the media. LANS refused to license the tape to appellee KCAL-TV. KCAL obtained a copy of the tape from another station and broadcast 30 seconds of it on its news programs.

LANS sued KCAL for copyright infringement. The district court granted summary judgment for KCAL, ruling that the doctrine of fair use exempted KCAL from liability because the Denny tape was unique and newsworthy; KCAL used portions of the tape in its newscasts for purposes of news reporting; and LANS failed to identify any sale or license that it lost due to KCAL's conduct. LANS appealed.

[1] The fair use of a copyrighted work for purposes such as news reporting is not an infringement of copyright Factors to be balanced in determining fair use include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

[2] That KCAL was reporting news weighed heavily in its favor; that LANS and KCAL were both in the business of gathering and selling news cut the other way. That KCAL used the copyrighted footage free of charge raised an inference that its articulated purpose of reporting the news was mixed with the actual purpose of doing so by using the best version — whether or not that meant riding LANS's copy-

righted coattails. It could not be said that KCAL's use of the tape had neither the effect nor purpose of depriving LANS of its also valuable right of licensing its original videotape.

[3] There was no evidence that KCAL used the LANS tape *itself* as a news item because its view was so extraordinary. KCAL did not attribute the tape to LANS and KCAL's voiceover did not add anything new or transformative to what made the LANS work valuable.

[4] That KCAL requested a license but had been refused one was not dispositive, but the propriety of a defendant's conduct is relevant to the character of the use to the extent that it may knowingly have exploited a purloined work for free that could have been obtained for a fee.

[5]The tape was information and factual and news which strongly favored KCAL.

[6] While a small amount of the entire video tape was used, it was all that mattered, which weighed against KCAL. That a substantial portion of an infringing work is copied verbatim is evidence of the qualitative value of the copied material.

[7] "News" isn't normally thought of as having a secondary market. Also, LANS's tape had been licensed — and published — before KCAL's use, and was licensed after its use. This weighed in favor of KCAL. At the same time, KCAL's purpose was to use the tape as "news" and it was a potential licensee or consumer of LANS's product. Given what LANS and KCAL did, use of LANS's works for free without a license, would destroy LANS's original, and primary market. This weighed against a finding of fair use.

[8] It could not be said that fair use was the only reasonable conclusion a trier of fact could reach. Reversal and remand for further proceedings was required.

COUNSEL

William A. Bergen, Reseda, California, and Henry D. Fetter, Doniger & Fetter, Los Angeles, California, for the plaintiff-appellant.

Jeffrey B. Valle, Skadden, Arps, Slate, Meagher & Flom, Los Angeles, California, for the defendant-appellee.

OPINION

RYMER, Circuit Judge:

Los Angeles News Service (LANS) shot the Reginald Denny beating from its helicopter. Its videotape was copyrighted and licensed to the media. KCAL-TV used it, without a license. LANS sued for copyright infringement, but the district court granted summary judgment in KCAL's favor, holding that its telecasts of LANS's videotape were exempted from liability under the "'fair use" doctrine. 17 U.S.C. § 107. We see the balance of fair use factors differently, and reverse.

I

Los Angeles News Service (LANS) is an independent news organization that provides news stories, photographs, audiovisual works and other services to the news media. When rioting broke out in Los Angeles on April 29, 1992, in the aftermath of the Rodney King verdict, LANS's helicopter hovered above the intersection of Florence and Normandie where Reginald Denny was beaten. Markika Tur's camera captured the incident from overhead. It was broadcast "live" on KCOP, a LANS licensee, and by tape later that evening. Other stations broadcast the Videotape as well, before it was broadcast by KCAL. KCAL asked LANS for a license, which LANS refused, but KCAL obtained a copy of the tape from another station and broadcast it a number

of times on April 30 and thereafter on its commercially sponsored news programs.

The district court held that the doctrine of fair use exempts KCAL from liability based on undisputed facts that the Denny Videotape is a unique and newsworthy videotape of significant public interest and concern; KCAL used portions of the tape in its newscasts for purposes of news reporting; and LANS failed to identify any sale or license or potential sale or license that it lost due to KCAL's conduct. Accordingly, it granted summary judgment in KCAL's favor. LANS moved for reconsideration based on evidence that it had lost at least one sale as a result of KCAL's unlicensed use of the Denny tape and that KCAL had other footage of the beating available to it. The district court denied the motion, and LANS timely appealed.[10]

II

" 'Fair use is a mixed question of law and fact.' If there are no genuine issues of material fact, or if, even after resolving all issues in favor of the opposing party, a reasonable trier of fact can reach only one conclusion, a court may conclude as a matter of law whether the challenged use qualifies as a fair use of the copyrighted work." *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150 (9th Cir. 1986) (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985); other citations omitted).

III

LANS argues that the district court inappropriately resolved the fair use factors because KCAL's use was non-

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[10]We do not reach LANS's appeal from denial of its motion to reconsider in light of our disposition.

transformative, commercial, and improper, it interfered with LANS's ability to control the initial dissemination of the Denny tape; the use was substantial even though KCAL broadcast only 30 seconds of the four minute, 40 second Videotape because it was the heart of the work; and it had a serious effect on the potential market for LANS's copyrighted work because KCAL's unauthorized commercial broadcasts competed directly with LANS's authorized licensees.

KCAL, on the other hand, focuses on the factual nature of the Videotape and its use for news reporting purposes. It challenges LANS's view that its use was nontransformative, noting that both the Supreme Court and this circuit have recognized that news reporting is a productive use. *See Harper & Row*, 471 U.S. at 561; *Los Angeles News Service v. Tullo*, 973 F.2d 791, 797 (9th Cir. 1992). KCAL also emphasizes that the Videotape had been published before KCAL ever used it. Further, it points out, only a small portion of the total amount of LANS's tape was used, and even then, only enough for KCAL to carry out its news reporting function of reporting on the riots. Moreover, KCAL submits, its use of the Videotape did not diminish the potential sale of the work or interfere with its marketability because LANS entered into more than a dozen licenses for the Videotape after KCAL used it. Rather, its use for news reporting purposes enabled the public to understand what the rioters did to Denny, and thus did not replace any demand for the original work. Finally, KCAL maintains that the Videotape is unique because the Videotape itself is part of the news event. For this reason, First Amendment considerations reinforce the conclusion that KCAL's use was fair.

[1] As KCAL undeniably used LANS's copyrighted work without permission, we turn to whether its use was fair. This requires us to balance the non-exclusive factors set out in 17 U.S.C. § 107.[11] *Harper & Row*, 471 U.S. at 549.

A

[2] *Purpose and character of use.* Even though the fact that KCAL was reporting news weighs heavily in its favor (§ 107 itself gives news reporting as an example), the fact that LANS and KCAL are both in the business of gathering and selling news cuts the other way. LANS does work that its licensees choose not to do for themselves, for example, operating its own helicopter with news crew aboard, and gets paid for licensing its coverage of news to the media. By the same token, KCAL is a for-profit company that is engaged in a commercial enterprise that also gathers, and then (indirectly) "sells" news. It, therefore, "stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562. "[N]ewscasts are commercially supported by advertisers, who pass the cost of sponsorship on to those who purchase their products." Note, *Who Can Use Yesterday's News?:*

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[11] Section 107 provides in relevant part:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as . . . news reporting . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Video Monitoring and the Fair Use Doctrine, 81 Geo. L. J. 2345, 2345 n.2 (1993). *Accord Roy Export Co. v. Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982). Thus, KCAL competes with other stations for advertising dollars, which are in turn dependent upon KCAL's viewership. The fact that KCAL used LANS's copyrighted footage free of charge, rather than paying LANS or someone else for the footage, or investing in its own helicopter and crew to obtain the footage itself, at least raises an inference that its articulated purpose of reporting the news was mixed with the actual purpose of doing so by using the best version — whether or not it meant riding LANS's (or some other station's) copyrighted coattails. While this did not serve to supplant the copyright holder's commercially valuable right of first publication as The Nation did in *Harper & Row* by scooping the hardcover and Time abstracts of President Ford's memoirs, we cannot say that KCAL's use of the Denny tape had neither the effect nor purpose of depriving LANS of its also valuable right of licensing its original videotape which creatively captured the Denny beating in a way that no one else did. *See, e.g., Tullo*, 973 F.2d at 796.

[3] On the other hand, there is a forceful argument that the LANS tape of the Denny beating *itself* became a news item shortly after it was published because its view was so extraordinary. To the extent that KCAL ran the tape as a news story, this would weigh in its favor. However, this factor does not weigh nearly so heavily as it might otherwise since there is no evidence that KCAL used the tape in this way. It did not attribute the tape to LANS, and so far as the record discloses, aired it as if it were KCAL's own rather than, for example, indicating that the best tape of the beating had been made by a LANS helicopter crew. Instead, the tape was simply used as part of KCAL's coverage of the riots. Although KCAL apparently ran its own voice-

over, it does not appear to have added anything new or transformative to what made the LANS work valuable — a clear, visual recording of the beating itself.

[4] While the fact that KCAL had requested a license but had been refused one is not dispositive, *see Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 1174 n.18 (1994), "the propriety of the defendant's conduct" is relevant to the character of the use at least to the extent that it may knowingly have exploited a purloined work for free that could have been obtained for a fee. *Harper & Row*, 471 U.S. at 562; *accord Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989). Unlike the circumstances in *Campbell*, nothing in this record suggests that KCAL requested a license "in a good faith effort to avoid this litigation." *Campbell*, 114 S. Ct. at 1174 n.18. And unlike the use of the original in 2 Live Crew's parody of "Oh, Pretty Woman," KCAL obtained a copy of the tape from another station, directly copied the original, superimposed its logo on the LANS footage, and used it for the same purpose for which it would have been used had it been paid for.

B

[5] *Nature of the copyrighted work.* The Denny beating tape is informational and factual and news; each characteristic strongly favors KCAL. Likewise the fact that the tape was published before its use by KCAL. *Harper & Row*, 471 U.S. at 564. Although the Videotape is not without creative aspect in that it is the result of Tur's skills with a camera, still this factor makes it a great deal easier to find fair use. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) (contrasting motion pictures with news broadcasts). Therefore, this factor weighs substantially in KCAL's favor. *Tullo*, 973 F.2d at 798.

C

[6] *Amount and substantiality of what was used.* While a small amount of the entire Videotape was used, it was all that mattered. As we said of the defendant Audio Video Reporting Services in *Los Angeles News Service v. Tullo*, which provided a video "news clipping" service by monitoring television news programs, recording them on videotape and selling copies to interested individuals and businesses, "[a]lthough AVRS copied only a small part of the raw footage shot by LANS, it was the most valuable part of that footage. In preparing a newscast, a television station selects the most effective and illustrative shots from the raw footage available. Thus the news programs AVRS copied included what LANS's customers thought was the best of the LANS footage — its 'heart.' " *Id.* at 798. Here, as there, this factor weighs against KCAL, for "the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression." *Harper & Row*, 471 U.S. at 565.

D

[7] *Effect on the market.* This case doesn't fit neatly into a traditional niche, because "news" isn't normally thought of as having a secondary market. " 'Copying a news broadcast may have a stronger claim to fair use than copying a motion picture' because the potential market for copies of news broadcasts is not as great as that for copies of movies." *Tullo*, 973 F.2d at 798 n.6 (quoting *Sony*, 464 U.S. at 455 n.40). Also, LANS's tape had been licensed — and published — before KCAL's use, and was licensed after its use. To that extent, this factor weighs in favor of KCAL. At the same time, KCAL's stated purpose was to use the tape as "news" and it was a potential (and in the past was an

actual) licensee or consumer of LANS's product; there is evidence that, given what LANS and KCAL do, KCAL's use of LANS's works for free, without a license, would destroy LANS's original, and primary market. Indeed, *Sony* suggests that this kind of duplication for commercial use may give rise to a presumption or inference of harm. *Sony*, 464 U.S. at 451. Just as we recognized in *Los Angeles News Service v. Tullo* that customers might choose to buy raw footage from LANS if they couldn't buy it from AVRS, *Tullo*, 973 F.2d at 799, KCAL was ready to buy from LANS if it could, but went elsewhere when it couldn't. Were this to happen more broadly, it no doubt would adversely affect LANS's creative incentives. *See Campbell*, 114 S. Ct. at 1176 (courts must consider " 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original") (quoting Nimmer, § 13.05[A][4], p. 113-102.61); *Harper & Row*, 471 U.S. at 569. All told, this weighs against a finding of fair use.

[8] In sum, KCAL's use of LANS's copyrighted tape was arguably in the public interest because it was a percipient recording of a newsworthy event. However, KCAL's use was commercial and came in the wake of LANS's refusal of a license. Although KCAL explains that it used the tape because it recorded news of considerable significance from the best perspective of any witness, there is no evidence that alternatives were not available (albeit from a less desirable vantage point). Also, while the tape had been licensed and published before KCAL's use, it is not obvious that there was no impact on the market for first publication rights as KCAL itself requested a license. There is no dispute that KCAL used the heart of the tape. Under these circumstances, we cannot say that fair use is the only

reasonable conclusion a trier of fact could reach in this case. We therefore reverse and remand for further proceedings.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOS ANGELES NEWS SERVICE,
Plaintiff — Appellant,

v.

KCAL-TV CHANNEL 9,
Defendant — Appellee.

No. 95-55261
D.C. No. CV-92-04247-RG

ORDER

Before: BRUNETTI and RYMER, Circuit Judges, and TANNER,* District Judge.

The parties are directed to file simultaneous briefs addressing the question whether the decision of the court in this case, filed March 11, 1997, should be reheard by this court en banc.

The briefs shall not exceed fifteen (15) pages in length, and shall be filed in forty (40) copies on or before twenty-one (21) days from the date of this order.

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* Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

17 U.S.C. § 107

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes:

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.